SUPREME COURT of The UNITED STATES

OCTOBER TERM, 1949

No. 339

In the Matter of the Petition of
LEE KAMEN for a Writ of Habeas Corpus,
Petitioner,

vs.

ROBERT GRAY,
Sheriff of Sedgwick County, Kansas,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

Your respondent, Robert Gray, Sheriff of Sedgwick County, Kansas, in opposition to the petition for writ of certiorari and supporting brief, respectfully shows to this Honorable Court:

A.

OPINIONS BELOW

The opinion of the Kansas Supreme Court, rendered 8 July 1950, is reported in 169 Kan. 664, 220 P. (2d) 160, and appears at pages 20-29 of the Petitioner's Petition for Writ of Certiorari and Brief in Support thereof heretofore filed in this Honorable Court.

The opinion of the Kansas Supreme Court, rendered 3 August 1950, denying petitioner's application for a rehearing of the case, has not yet been officially or unofficially reported.

B.

JURISDICTION.

Petitioner seeks to invoke this Court's jurisdiction directly under Title 28, United States Code, Section 2101 (c) – and indirectly under the Fifth and Fourteenth Amendments to the United States Constitution and Sec. 10 (Bill of Rights) of the Kansas Constitution.

The decree of the Kansas Supreme Court was rendered on 8 July 1950. Timely petition for rehearing was denied on 3 August 1950. Petition for writ of certiorari was filed on 28 September 1950. A copy of petition and brief was served on counsel for respondent on 5 October 1950. To date no printed record or certified transcript of the record in this case has been served by the petitioner on counsel for the respondent, although more than ten days from the filing of the petition have elapsed. No references, therefore, to the page numbers of the printed record can be made. References to the record will be made, therefore, in this brief to the page numbers of the transcript made in the trial court.

Respondent maintains that the petitioner has not raised a federal question of substance not heretofore determined by this Court and that the decision of the Kansas Supreme Court of which petitioner complains was decided in accord with the applicable decisions of this Court – hence certiorari should be denied.

C.

STATEMENT OF THE CASE

This was an action by Lee Kamen for a writ of habeas corpus. Lee Kamen is the defendant in a criminal case now pending in the District Court of Sedgwick County, Kansas, for receiving stolen property, knowing it to have been stolen. The habeas corpus action was filed by the defendant Kamen as an original proceeding in the Kansas Supreme Court, on the grounds that by the trial court's action in discharging the jury during the progress of the trial, the defendant was immune from further prosecution on the grounds of double jeopardy. The Kansas Supreme Court in its decision held that the record disclosed that the defendant consented to the mistrial; that the defendant Kamen by his own motion had requested the Court to order a mistrial and the Court's action in doing so was the necessary result of sustaining the defendant's request. The Kansas Supreme Court concluded that the petitioner by his request for a mistrial, waived his constitutional right of jeopardy, if such existed. The basic facts essential to an understanding of the controversy are as follows:

Lee Kamen, the petitioner, on January 16, 1950, was placed on trial before a jury in the District Court of Sedgwick County, Kansas, in State of Kansas, Plaintiff, vs. Lee Kamen, Defendant, Case No. A29287, for receiving stolen property, knowing it to have been stolen. The petitioner had waived arraignment, pleaded not guilty, and the State introduced the testimony of seven witnesses. The defendant's counsel cross examined the State's seventh witness, Detective J. H. Reeves of the Wichita, Kansas, Police Department, concerning a police report and particularly as to certain alleged corrections or alterations contained therein. (State's Exhibit 12.) (T. 394-412.) After the defendant's

cross examination, the State offered the report in evidence, and it was admitted over the defendant's objection and read to the jury. (T. 392-394.)

The defendant then again objected to the police report (State's Exhibit 12), and asked the Court to declare a mistrial of the case by stating in open court:

> "MR. WEISKIRCH: Now, if your honor please, again we urge that that statement of J. H. Reeves, dated 4-17-48, 4:30 p. m., consisting of six sheets, styled 'The Coleman Company, Inc., 240 North St. Francis, dated 4-12-48, at the right C-81405, known as State's Exhibit 12, is wholly incompetent, irrelevant and immaterial which has been read to the jury with the permission of the court, by counsel for the State, we now ask the Court to declare a Mistrial of this case on account of the error and prejudice that has been engendered in the minds of the jury by the reading of the report of this case by the Detective and Police Officers, for the reason it is wholly incompetent and has no place in this proceeding and it contains hearsay of the rankest sort and stories that he got in different conversations without the presence of the accused, all of which is highly prejudicial and all together incompetent and we ask that you declare a mistrial at this time." (T. 412-413.)

The Court overruled the objection, and the defendant then moved for a directed verdict of not guilty, for the reason the State failed to prove the allegations and averments in the State's second amended information, on which the defendant was being tried. (T. 416.)

At the close of the argument, without any request whatsoever on the part of the State for a mistrial, the Trial

Court said in part, " . . . I am declaring a mistrial and that ends the trial of this case. Now, then, but I am also required and will require a new information totally, so that there will be no further mixing up on it. If the defense has any objection?" (T. 418-419.)

> "MR. WEISKIRCH: We will even assist them, if they want us to, in the description of the property." (T. 419.)
>
> "THE COURT: You bring it before the Court within a month after it is filed, anyway." (T. 419.)

Counsel for the State then inquired upon what grounds the mistrial was being declared, and the Court answered in substance that prejudicial error went to the jury due to the actions of both the plaintiff and defendant, and that there was a question of whether "it is justice or not," and for that reason he was granting a mistrial. (T. 419-420.)

The jury was then immediately discharged by the Court. No journal entry of the proceedings has been agreed upon, as it is the State's firm contention that the mistrial was granted at the defendant's counsel's request made during the argument of defendant's motion for a directed verdict during the absence of the reporter from the court room, as well as upon the defendant's previous motion for a mistrial, and the defense will not now concede to this. The Trial Court took a leave of absence due to failing health within a very few days after these occurrences transpired and traveled to South America and has not as yet returned to the bench. No journal entry can be filed, since the plaintiff and defendant are not in agreement, until the Trial Judge returns to his duties.

A new amended information was filed by the State in accordance with the Trial Court's instructions. The defend-

ant, instead of proceeding to trial on the new information in the next term of court, filed a petition for a writ of habeas corpus in the Kansas Supreme Court. The petition for a writ of habeas corpus was filed on the 21st day of February, 1950. The petition for a writ of habeas corpus, after oral argument, was denied on 8 July 1950. A motion for rehearing was denied by the Kansas Supreme Court on 3 August 1950, all on the grounds that the defendant had requested and consented to the Court's ordering a mistrial.

It is this decision which the petitioner asks this Court to review upon certiorari.

D.

SUMMARY OF ARGUMENT

I. The mistrial was ordered by the Trial Court upon petitioner's consent, instigation and request, which constituted a waiver by the accused of his constitutional rights, if any existed. Under the present facts, double jeopardy does not exist under the Kansas laws, or when measured by the Federal rule, and violates neither the Fifth nor the Fourteenth Amendment to the United States Constitution or the Bill of Rights of the State of Kansas.

II. The right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment to the United States Constitution is not generally regarded as coming within the scope and protection of the due process and privileges and immunities clause of the Fourteenth Amendment, and from which is derived Federal power to correct State process.

III. The question of authority and power of petitioner's attorney to consent to and request the Court to order a

mistrial was not raised before and, therefore, is not a proper subject of review in a petition for certiorari.

E.

ARGUMENT AND AUTHORITIES

I. FORMER JEOPARDY IS NOT A DEFENSE WHERE THE JURY WAS DISCHARGED ON THE DEFENDANT'S MOTION OR WITH HIS CONSENT.

The Supreme Court of the State of Kansas found that the trial court's action in ordering a mistrial and discharging the jury " . . . was the necessary result of sustaining defendant's request and he has no right to complain that the court took the action which he had requested and to which no objection was made; his actions amounted to a consent." *In the Matter of the Petition of Lee Kamen for a Writ of Habeas Corpus* v. *Robert Gray, Sheriff of Sedgwick County, Kansas,* 169 Kan. 664, 667; 220 P. (2d) 160.

The Kansas Supreme Court, in denying petitioner's application for a writ of habeas corpus, followed the rule of that court previously expressed in *State* v. *Arnold,* 142 Kan. 589, 50 P. (2d) 1008; *State* v. *McKinney,* 76 Kan. 419, 91 P. 1068; and *State* v. *Reynolds,* 140 Kan. 269, 36 P. (2d) 323.

It is submitted that ample facts were present justifying the Kansas Supreme Court's conclusion, including petitioner's motion for a mistrial, where it was stated, " . . . We now ask the court to declare a mistrial of this case on account of the error and prejudice that has been engendered in the minds of the jury . . . and we ask that you declare a mistrial at this time." (T. 412-413.)

At the time the trial court ordered a mistrial and before discharging the jury, the Court queried, " . . . If the de-

fense has any objection?" (T. 419.)

As can be seen from the transcript taken in the trial court, the attorney for the petitioner replied, "We will even assist them, if they want us to, in the description of the property." (T. 419.)

The Kansas Supreme Court, in denying petitioner's application for a writ of habeas corpus on the grounds of double jeopardy, acted under the authority of previous decisions of that State and in accordance with the authority of the decision in *Barrett* v. *Bigger*, 17 F. (2d) 669, 670, (App. D. C.), certiorari denied, 274 U. S. 752, 71 L. ed. 1333, 47 S. Ct. 765, in which case the Court said:

> "A defendant cannot plead former jeopardy, where the jury by which he was first on trial was discharged on his own motion or with his consent." (p. 670.)

It should be noted in the case last cited that certiorari was denied under facts and circumstances strikingly similar to those present in the case at bar. Among the numerous additional authorities holding that former jeopardy is not a defense where the jury was discharged on the defendant's motion or with his consent, are: *Thompson* v. *U. S.*, 155 U. S. 271, 39 L. ed. 146, 15 S. Ct. 73; *U. S.* v. *Watson*, 28 Fed. Cas. No. 16,651. The United States Supreme Court will not generally review such cases: *Williams* v. *Kaiser*, 323 U. S. 471, 89 L. ed. 398, 65 S. Ct. 363.

Petitioner in his brief has cited the statute of the State of Kansas, G. S. 1935, 60-2914, which reads as follows:

> "The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity or other necessity to be found by the court requiring their discharge, or by consent of both parties, or after

> they have been kept together until it satisfactorily appears that there is no probability of their agreeing."

We submit that this statute is not important to the consideration of this case, inasmuch as the petitioner requested and consented to the ordering of the mistrial by the Trial Court. (T. 412-413, 419.) The only protest to the ordering of the mistrial was on the part of the State. (T. 419.)

The Kansas statute enumerates sundry reasons for which a Trial Court may discharge the jury, but in construing the statute, the Kansas Supreme Court has expressly pronounced that the discharge of a jury in a criminal case with the defendant's consent or upon the motion made by the defendant is not a bar to subsequent prosecution for the same offense: *State v. McKinney, supra; State v. Reynolds, supra;* and *State v. Arnold, supra.*

The petitioner in his brief, in commenting on the syllabus written by the Kansas Supreme Court, asserts a misstatement of fact was made in the syllabus, contending the record does not disclose that the court on its own motion reversed its former ruling and declared a mistrial on the grounds set forth in defendant's original motion for declaration of a mistrial. It is submitted that this constitutes a play on words, and that the attorney for the petitioner, in making his argument before the Kansas Supreme Court, insisted that the Trial Court on its own motion without the defendant's consent declared a mistrial, which theory was rejected by the Kansas Supreme Court on the basis of the testimony and statements made during the trial of the case in the lower court. The Kansas Supreme Court, in rejecting petitioner's theory, pointed out that the defendant had requested on his own motion and consented to the Court's ordering a mistrial and discharging the jury.

The petitioner's brief relies on the case of *State* v. *Stiff*, 117 Kan. 243, 234 P. 700, affirmed on rehearing 118 Kan. 208, 234 P. 700, for the proposition that once jeopardy has attached it cannot be voided by the Court's sustaining a motion which had previously been presented and denied.

The facts in the case of *State* v. *Stiff, supra,* reflect that the motion originally made, which was overruled, was to quash the information on the grounds that it did not state facts sufficient to constitute a public offense. At the time this motion was made, the jury had not been impaneled and sworn to try the cause. After the jury had been sworn and while the prosecuting attorney was making the opening statement to the jury, it was discovered by the prosecution that the information was defective. The prosecution asked leave to amend the information, which request was denied. The Court entered an order quashing the information. The prosecution then filed a subsequent information, charging the defendant with the same offense, and upon trial a verdict of guilty was returned and judgment was pronounced thereon. In view of these circumstances and in absence of the consent of the accused to the discharging of the jury, the Court held that the defendant had been placed twice in jeopardy and was dicharged. It is submitted that this case is not in point, and the facts and ruling of the court in the case of *State* v. *Stiff* were considered below by the Kansas Supreme Court and dismissed as not controlling, by the following statement:

> "Defendant relies principally on the case *State* v. *Stiff*, 117 Kan. 243, 234 P. 700, rehearing 118 Kan. 208. We do not believe this case is controlling under the facts in the instant case."

The Court further pointed out that in the case *State* v. *Stiff*, jeopardy had not attached at the time the motion to

quash the information was made.

The Kansas case of *State* v. *Arnold,* 142 Kan. 589, 50 P. (2d) 1008, cited by the Kansas Supreme Court for the proposition that where the jury was discharged at the instance and with the consent of the defendant, he cannot set up that fact as a bar to subsequent prosecution, was decided and reported ten years after the decision in *State* v. *Stiff* was rendered.

The case of *State* v. *Stiff* was cited and strongly urged in the case of *State* v. *Reynolds,* 140 Kan. 269, 36 P. (2d) 323, which was decided nine years after the *State* v. *Stiff* case. Nevertheless the Kansas Supreme Court in *State* v. *Reynolds,* upon facts fully analogous to those of the case at bar, followed the established Kansas law by holding in effect that when the jury, at the instance of the defendant, has been discharged, the defendant cannot thereafter plead former jeopardy when placed on trial on another information for the same offense, having waived by his former action his constitutional privilege.

II. "DOUBLE JEOPARDY" UNDER THE FIFTH AMENDMENT, OR AS CONSTRUED WITH THE PROVISIONS OF THE FOURTEENTH AMENDMENT, IS NOT CONSIDERED A PROPER SUBJECT OF REVIEW WITHIN THE FEDERAL POWER OF THIS COURT TO CORRECT STATE PROCESS.

The constitutional questions asserted by petitioner have been raised indirectly and primarily by implication. Only constitutional issues raised in the lower courts are considered by this court on appeal or by certiorari: *Hulbert* v. *City of Chicago,* 202 U. S. 275, 50 L. ed. 1026, 26 S. Ct. 617. Petitioner contends in his argument that the defendant's rights and immunities afforded him under the Fifth Amendment to the Constitution of the United States (and the Bill

of Rights of the State of Kansas) are being violated. It has been repeatedly held that the Fifth Amendment to the Constitution "does not operate as a 'restriction of the powers of the State, but was intended to operate solely upon the Federal Government'." *Barrington* v. *Missouri,* 205 U. S. 483, 51 L. ed. 890, 27 S. Ct. 582, citing *Brown* v. *N. J.,* 175 U. S. 172, 44 L. ed. 119, 20 S. Ct. 77.

In *McNabb* v. *U. S.,* 318 U. S. 332, 340, 87 L. ed. 819, 63 S. Ct. 608, rehearing denied, 319 U. S. 784, 87 L. ed. 1727, 63 S. Ct. 1322, it was held that the power of the United States Supreme Court to undo convictions in State courts "is limited to the enforcement of those 'fundamental principles of liberty and justice' which are secured by the Fourteenth Amendment . . . " *Hebert* v. *Louisiana,* 272 U. S. 312, 316, 71 L. ed. 270, 47 S. Ct. 103, 48 A. L. R. 1102.

Double jeopardy under the Fifth Amendment to the Constitution has been construed in *Commonwealth ex rel Garland v. Ashe,* 344 Pa. 407, 26 Atl. (2d) 190, to apply as a restriction only on the power of the Federal Government and not on the State Government: *Hurtado* v. *California,* 110 U. S. 516, 534, 28 L. ed. 232, 4 S. Ct. 111, 4 S. Ct. 292; *State of Kansas* ex rel *William A. Smith* v. *The City of Kansas City, et al.,* 125 Kan. 88, 90, 262 P. 1032; *Frank J. Sester* v. *The Belvue Drainage District,* 162 Kan. 1, 6, 173 P. (2d) 619.

In the case of *Bennington* v. *Warden of Maryland House of Correction,* ____ Md. ____, 59 Atl. (2d) 779, it was held:

> "The rule against double jeopardy contained in the Fifth Amendment to the United States Constitution applies only to trials in the Federal courts and is not implicit in the Fourteenth Amendment."

Cited in the case is *Palko v. State of Connecticut*, 302 U. S. 319, 82, L. ed. 288, 58 S. Ct. 149.

Under the decisions above cited, and numerous others, it is apparent that the provisions of the Fifth Amendment relating to double jeopardy should not be construed as a restriction upon the State courts unless, perhaps, in extreme instances shocking to this Court and to mankind. No such circumstances are present in this case, and no precedent has been found under the Fifth Amendment which would authorize or make it advisable for the Supreme Court of the United States to review the decision of the Kansas Supreme Court upon the authority of the Fifth Amendment.

Inasmuch as petitioner, in his petition and brief to this Court, premises his claimed deprivation of rights, privileges and immunities exclusively upon the Fifth Amendment, and inasmuch as that amendment, as hereinbefore demonstrated, has no application to state courts, it follows ineluctably that petitioner has failed to adduce any ground for certiorari within the jurisdictional requirements of this Court. Accordingly, the petition must be denied.

As for the Fourteenth Amendment, petitioner, albeit setting forth the amendment in his petition for habeas corpus (Pet. for Cert., p. 12), failed to present any argument based thereon to the Kansas Supreme Court. Nor does the Kansas Supreme Court opinion deal with or discuss the Fourteenth Amendment. Moreover, and in any event, freedom from "double jeopardy" – the sole deprivation upon which petitioner seeks certiorari – is not guaranteed by the *Fourteenth Amendment*. Thus, in *Amrine* v. *Tines*, 131 F. (2d) 827 (C. C. A. 10), defendant Tines was charged with forgery of a bank check in the District Court of Sedgwick

County, Kansas, the same forum in which the case at bar arose. A jury was duly impaneled and the State completed its case and rested; whereupon the Court, upon its own motion but without objection from either party, dismissed the action without prejudice. A short time later the defendant was again charged for the same offense in the same jurisdiction and pleaded double jeopardy, in violation of his constitutional rights granted by the Fifth and Fourteenth Amendments. With reference to said contention, the Court held:

> "The contention of the appellee, upheld by the trial court, that he was twice placed in jeopardy for the same offense in violation of his constitutional rights, . . . must rest upon the dominant command of the Fourteenth Amendment. And . . . the right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment, is not generally regarded as a member of that family of fundamental rights coming within the scope and protection of the due processes and privileges and immunities clause of the Fourteenth Amendment, and from which is derived Federal power to correct State process."

The Court commented further that if the right sought to be vindicated, that is, double jeopardy, does not come within the dominant command of the Fourteenth Amendment, jurisdiction to inquire concerning the cause of restraint does not exist in the Federal Court, and in arriving at this conclusion the Federal courts have received assistance by applying the Federal rule in cases brought up from the State court in determining that double jeopardy did not actually exist.

Attention is directed to the fact that the case of *Amrine v. Tines, supra,* arose in the same jurisdiction and same court as the case at bar, and although the facts in the

Amrine case came closer to justifying the claim of double jeopardy made by the petitioner than the facts in the case at bar, the Federal Court in the *Amrine* case declined to interfere with, alter or correct the processes of the State court.

This court, in construing the due process of law clause of the Fourteenth Amendment has stated that this clause does not take up the laws of the several States and make all questions pertaining to them constitutional questions, nor does it enable the United States Supreme Court to review the decisions of the State courts upon questions of State law: *Enterprise Irrigation District* v. *Farmers Mutual Canal Company*, 243 U. S. 157, 61 L. ed. 644, 37 S. Ct. 318.

It is therefore submitted that jurisdiction is lacking to grant certiorari in the case at bar.

III. PETITIONER BY HIS ATTORNEY CONSENTED TO AND MOVED THE COURT TO ORDER A MISTRIAL.

Petitioner now contends, for the first time, that his attorney had no power or authority to ask for or consent to a mistrial when the case was being tried in the lower court. Petitioner was represented in the lower court by able counsel (in fact no less than three of them) who were present at all stages of the proceedings and spoke for the petitioner on his behalf when called upon to do so and when they deemed it advisable.

Petitioner, in support of his argument to the effect that the defendant should not be considered as acquiescing in his attorney's request for the ordering of a mistrial and consent to the ordering of a mistrial, cites the case of *Glasser* v. *U. S.*, 315 U. S. 60, 72, 86, L. ed., 680, 62 S. Ct.

457, 465, which case it is submitted is not in point. The only portion of the case which could possibly have any bearing on the point for which it is cited is that part of the opinion granting the defendant his rights to be represented by an attorney under the Sixth Amendment. It has never been contended petitioner was denied this constitutional right.

Petitioner maintains that under *State* v. *Stiff, supra,* 118 Kan. 208, 234 P. 700, and under the authority of 16 C. J. 254, inasmuch as the *defendant* remained silent in the courtroom – although his *attorney* moved the court for a mistrial and consented to the court's granting a mistrial and discharging the jury – the defendant's rights were not waived by his silence. We believe this position is untenable and are unable to find anything in the case of *State* v. *Stiff, supra,* as authority for this statement.

The cases cited by petitioner on page 42 of his brief, to the effect that a strong presumption is raised against the waiver of fundamental rights by an accused, are not remotely in point here. In any event, this issue was never presented to or decided by the Kansas Supreme Court and manifestly affords no proper basis for certiorari.

On pages 43 and 44 of the petitioner's brief, various cases are cited in support of the petitioner's contention that the defendant was acquitted as a matter of law when the Trial Court declared a mistrial upon a ground not provided by statute and without an absolute necessity therefor. We believe this statement to be an incorrect statement of the law in Kansas, contrary to the holdings of the Kansas Supreme Court in the cases of *State* v. *McKinney,* 76 Kan. 419, 91 P. 1068; *State* v. *Reynolds,* 140 Kan. 269, 36 P. (2d) 323; and *State* v. *Arnold,* 142 Kan. 589, 50 P. (2d)

1008, and we submit that the following cases cited by petitioner in support of his erroneous statement of the law are inapplicable and not in point for the following reasons:

State v. Smith, 44 Kan. 75, 24 P. 84,
because the defendant was not present and the jury was discharged because of one of the juror's illness;
State v. Reed, 53 Kan. 767, 37 P. 174,
because the court held that when the jury was discharged by reason of the sickness of one of its members, it did not constitute double jeopardy;
State v. Allen, 59 Kan. 758, 54 P. 1060,
because the defendant did not consent to or request a mistrial or that the jury be discharged;
State v. Klauer, 70 Kan. 384, 78 P. 802,
because the jury was discharged, as they could not agree;
In Re Rockwood, 146 Kan. 386, 69 P. (2d) 703,
because the jury was dismissed by the court during the proceedings, whereupon the court proceeded to try the case without the jury and found the defendant guilty.

The record fully reflects that the accused was at all times and at all stages of the proceedings represented by competent counsel, and that they were vigilant and active in the defense of his rights and in the making of a record for the protection of his rights. The ordering of a mistrial and the resulting discharge of the jury was at the request, instigation and with the consent, of the accused through his attorney, and it is well established that when a party invites a particular ruling, he is precluded from assailing such ruling on review: *Mercer, et al.* v. *McPherson, et al.,* 70 Kan. 617, 79 P. 118.

IV. DOUBLE JEOPARDY UNDER THE KANSAS BILL

OF RIGHTS IS A STATE QUESTION AND NOT FOR FEDERAL REVIEW.

The petitioner also complains to this Court that he has been deprived of his rights and the protection to which he is entitled under Section 10 of the Bill of Rights of the Constitution of Kansas, which in part reads:

> " . . . No person shall be a witness against himself, or be twice put in jeopardy for the same offense."

The determination of this question is one solely and exclusively to be decided by the Supreme Court of Kansas, and the decision of that court is and should be final on that particular question: *Jack* v. *Kansas,* 199 U. S. 372, 50 L. ed. 234, 26 S. Ct. 73.

F.

CONCLUSION

Petitioner seeks certiorari to the Kansas Supreme Court upon the sole ground that its decision erroneously subjects him to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States. Since that amendment has no application to State courts, it follows that jurisdiction is lacking to grant petitioner the relief prayed for. (28 U. S. C. §1257(3))

Moreover, review by certiorari is not a matter of right but of sound judicial discretion, granted only when there are special and important reasons therefor and where a State court has decided a Federal question of substance not theretofore determined by this Court or in a way probably not in accord with this Court's applicable decisions (Rule 38(5)). The precise questions presented by petitioner have been decided numerous times previously, not only by this Court but also by inferior courts of nearly every

jurisdiction, and it is submitted there are no special or important reasons for allowing certiorari in the case at bar.

Respectfully submitted,

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